***UNITED STATES DISTRICT COURT***

***DISTRICT OF MAINE***

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| ***FRONTIERVISION OPERATING PARTNERS, L.P.,*** | ) | |
| ***Plaintiff*** | ) | |
| ***v.*** | ) | ***Docket No. 01-16-P-DMC*** |
| ***THE TOWN OF NAPLES, MAINE,*** | ) | |
| ***Defendant*** | ) | |

## *MEMORANDUM DECISION*[1]

In this action arising under the Cable Act, 47 U.S.C. § 521 *et seq*., the plaintiff, FrontierVision Operating Partners, L.P., d/b/a Adelphia Cable Communications ("FrontierVision"), seeks preliminary and permanent injunctive relief and declaratory judgment concerning the renewal of its cable television franchise. Trial of the action on the merits has been advanced and consolidated with hearing on the plaintiff's motion for a preliminary injunction (Docket No. 6) and the parties have agreed to submit the case to the court for decision on the papers. Report of Conference of Counsel and Order (Docket No. 8) at 2. Accordingly, this memorandum decision addresses the substance of the plaintiff's claims on the merits and its request for injunctive relief.[2] The parties have jointly submitted a factual record. Record (Docket No. 19). In effect, this matter is to be tried on the papers on a stipulated

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

[2] The complaint and the motion for a preliminary injunction seek identical relief. Verified Complaint (Docket No. 1) at 9-10; Amended Motion for Preliminary Injunction, etc. ("Motion") (Docket No. 9) at 13.

record, and the court may thus resolve any disputed questions of fact. *Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 31 (1st Cir. 2000).

## I. Factual Background

FrontierVision, a limited partnership, is a "cable operator" within the meaning of the Cable Act. Verified Complaint (Record Exh. 1) ¶ 1. The defendant is a "franchising authority" within the meaning of the Cable Act. *Id*. ¶ 2. FrontierVision provides television cable service to the residents of the defendant town. *Id*. ¶ 5. The defendant provided FrontierVision's predecessor with a fifteen-year franchise to do so under an agreement dated March 19, 1985. *Id*. ¶ 6. There are currently approximately 900 subscribers to FrontierVision's service in Naples; FrontierVision is the only provider of such services in Naples although its franchise is not exclusive. *Id*. ¶¶ 7-8. FrontierVision must have a franchise in order to provide this service. *Id*. ¶ 9.

FrontierVision's franchise in Naples was due to expire on March 19, 2000. *Id*. ¶ 11. By letter dated March 25, 1997 FrontierVision notified the defendant that it invoked formal franchise renewal proceedings under 47 U.S.C. § 546(a)(1). *Id*. ¶ 14; Exh. A to Affidavit of Paul Bayliss ("Bayliss Aff.") (Record Exh. 2). The letter states, in relevant part:

> [W]e are requesting that the Town of Naples initiate renewal proceedings as prescribed by Section 626(a)[3] of the Cable Act. While we would welcome the opportunity to assist you in the renewal proceedings outlined in this section, we recommend that the Town temporarily suspend formal measures so that we may proceed with the renewal through informal discussions as provided for under Section 616(h) [sic; should read 626(h)].

Letter dated march 25, 1997 from Brian D. Gasser to Board of Selectmen, Exh. A to Bayliss Aff. On November 19, 1998 and January 27, 1999 a Cable Advisory Committee authorized by the defendant to conduct ascertainment proceedings pursuant to 47 U.S.C. § 546(a) presented its findings and recommendations to the defendant's board of selectmen. Verified Complaint ¶ 15. On March 29,

1999 the defendant issued a request for proposal to FrontierVision setting forth the defendant's minimum requirements for renewal of the franchise. Bayliss Aff. ¶ 10 & Exh. B. A letter dated May 20, 1999 from the defendant's attorney to FrontierVision's vice-president of operations states, in relevant part:

> The Town recently forwarded to FrontierVision a Request for Proposal pursuant to Section 626 of the Cable Act. This is to confirm that the Town would like to receive FrontierVision's response to the RFP as soon as possible, and within the date set for a response in the RFP. Upon receipt of a response, the Town anticipates that the parties would put any further formal renewal proceedings on hold and attempt to negotiate an acceptable franchise agreement.
>
> If you have any questions about this approach, please feel free to contact me.

Exh. C to Bayliss Aff. FrontierVision did not respond with any objection to the suspension of formal proceedings proposed in this letter. Bayliss Aff. ¶ 12. FrontierVision delivered a response to the request for proposal on June 1, 1999. Verified Complaint ¶ 17.

The parties thereafter engaged in extended informal negotiations in an effort to reach agreement on a new franchise agreement. Bayliss Aff. ¶ 14. At least five negotiating meetings took place between August 3, 1999 and November 16, 2000. *Id*. At no time during this period did FrontierVision express any objection to the procedure being followed by the defendant, request that the defendant take formal action on its proposal, or object to the fact that the defendant did not take formal action on its proposal within four months of its submission.[4] *Id.* On October 1, 1999 the interests of the partners in FrontierVision were acquired by Adelphia Communications Corporation

[3] 47 U.S.C. § 546(a).

[4] The Cable Act provides, in relevant part: "Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise pursuant to subsection (b) of this section, the franchising authority shall . . ., during the 4-month period which begins on the date of the submission of the cable operator's proposal . . ., renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding . . . ." 47 U.S.C. § 546(c)(1).

("Adelphia"). Affidavit of William J. Mahon, Jr. ("Mahon Aff.") (Record Exh. 3) ¶ 2. FrontierVision continues to own and operate the cable system serving Naples. *Id.*

A letter from the defendant's attorney to attorneys for Adelphia dated September 19, 2000 includes the following relevant statements:

> It now appears that the parties are moving away from any resolution of this Franchise.
>
> * * *
>
> At this point, the Town is running out of options. The Town previously conducted and completed an Ascertainment Proceeding, and issued an RFP to Adelphia, to which Adelphia responded. As negotiations appear unsuccessful, the Town's next step is to vote to accept or reject Adelphia's response to the RFP, which vote will be the Town's preliminary determination pursuant to Section 626(c).
>
> Before the Town proceeds with its vote, I would like to attempt one final time to get this matter resolved.

Exh. E to Bayliss Aff. at 1-2. A responsive letter from Martha Hudek, a staff attorney for Adelphia, states, in relevant part:

> You stated in your letter to me dated September 19, 2000 that the "Town's next step is to vote to accept or reject Adelphia's response to the RFP, which vote will be the Town's preliminary determination pursuant to Section 626(c)." Subsequently, in an e-mail . . . dated October 31, 2000 you stated that barring a final attempt to finalize negotiations the Town's "only choice is to deny renewal and adopt a thorough cable ordinance to deal with many of the disputed issues."
>
> * * *
>
> On June 1, 1999 FrontierVision . . . filed a formal response to the March 1999 RFP pursuant to Section 626(b) of the Cable Act. The Town never accepted or preliminarily rejected FrontierVision's proposal in the subsequent 4-month timeframe as prescribed by Section 626(c)(1). In view of the lengthy passage of time and the Town's failure to follow the statutory process, we do not believe FrontierVisions' [sic] formal response can lawfully be resurrected on a moment's notice and then denied by the Town.
>
> * * *
>
> Adelphia will submit a formal proposal to the Town pursuant to Section 626(b) by January 31, 2001.

Letter dated November 14, 2000 from Martha Hudak to Patrick J. Scully, Esq., Exh. F to Bayliss Aff., at 1. In early December 2000 FrontierVision sent the defendant a final draft franchise, which was unacceptable to the defendant. Bayliss Aff. ¶ 19. In a letter dated January 16, 2001 to Ms. Hudak, the defendant's attorney stated:

> This is to notify Adelphia that the Town of Naples' Board of Selectmen will be meeting on Monday evening, January 22, 2001 at 7:00 p.m. At that meeting, the Board of Selectmen will consider the adoption of a Cable Television Ordinance for the Town of Naples in accordance with 30-A M.R.S.A. § 3008. The Board of Selectmen at that meeting will also review the formal RFP submitted by FrontierVision to the Town and will make a determination whether to renew the Franchise or issue a preliminary assessment that the Franchise should not be renewed, in accordance with Section 626(c)(1) of the Cable Act. Please feel free to contact me if you have any questions.

Exh. H to Bayliss Aff. In a letter, apparently provided to *The Bridgton News* and published therein on an unknown date, the Naples Cable TV Advisory Committee stated, in relevant part:

> In view of the difficulties the committee has encountered in its negotiations, it has asked the board of selectmen to adopt a cable ordinance for the Town of Naples. Such an ordinance would have the effect of existing law and would require any cable TV service franchise to meet its provisions.

Verified Complaint ¶ 25 & Exh. A thereto at [2]. The defendant "issued a press release confirming its intention to deny . . . renewal at the January 22 meeting based on the 1999 proposal, and its plan to enact the . . . ordinance." Verified Complaint ¶ 25.

FrontierVision filed its verified complaint with this court on January 22, 2001. Docket. The verified complaint alleges violation of the Cable Act, Verified Complaint ¶¶ 18, 21, 24, 27-28, and seeks declaratory and injunctive relief, *id*. ¶¶ 31-34. Specifically, the verified complaint seeks injunctive relief preventing the defendant from denying renewal of the franchise based on the 1999 proposal; requiring the defendant "to accept the 1999 proposal as Adelphia's renewal franchise, or, in the alternative, to permit Adelphia to file a new formal proposal and to act on such new proposal in

accordance with all of the requirements of § 546(a) through (g);" establishing a time schedule for the completion of statutory requirements with respect to the new formal proposal; and "prohibiting Naples from attempting to circumvent the legal requirements of § 546 by enacting an ordinance to mandate the inclusion of terms in renewal franchises." *Id*. at 10.

The parties have agreed to maintain the *status quo* until the motion for preliminary injunction is resolved by the court. Agreed Order on Motion for Temporary Injunction ("Agreed Order") (Docket No. 5) at 1; *see also* Report of Conference of Counsel and Order (Docket No. 8) at 2. Specifically, the defendant agreed to take no action on the 1999 proposal and the proposed cable franchising ordinance and the plaintiff agreed not to submit another franchise proposal. Agreed Order at 1-2.

## II. Discussion

### A. Franchise Renewal

FrontierVision bases its claims primarily on the defendant's failure to comply with the four-month deadline, running from the date on which a renewal proposal is submitted by a cable operator, imposed by section 546(c)(1) for issuance of a franchise renewal or a preliminary assessment that the franchise should not be renewed.[5] Motion at 4-9. The defendant responds, Defendant's Amended Objection to Plaintiff's Motion for a Preliminary Injunction, etc. ("Defendant's Objection") (Docket No. 18) at 11-14, that its "alleged error" in this regard was harmless within the meaning of section 546(e)(2), which provides that "[t]he court shall grant appropriate relief if the court finds that . . . any

[5] The 1999 FrontierVision proposal was clearly submitted pursuant to subsection (b) of section 546, as required by section 546(c)(1).

action of the franchising authority, other than harmless error, is not in compliance with the procedural requirements of this section." The defendant also argues that FrontierVision has effectively waived any right to insist upon enforcement of the deadline, or is estopped to make such a claim, by its agreement to suspend the formal requirements of the Cable Act; that the only available remedy for a franchising authority's failure to comply with the deadline is a court order requiring it to act on the proposal; and that the courts may not take any action until a cable operator's proposal has been rejected by a franchising authority. *Id*. at 14-23. The last of these contentions is plainly wrong. If such were the case, a franchising authority could refuse indefinitely to act on a cable operator's proposal for a renewed franchise, a possibility clearly not within the letter or the spirit of the provisions of the Cable Act.

The defendant's waiver argument, however, has merit. FrontierVision devotes considerable time and effort to an argument that the statutory deadline at issue is "mandatory," Motion at 4-8; Reply Memorandum (Docket No. 14) at 5, and the defendant disputes the point, Defendant's Objection at 13, but the court need not decide this issue. The Supreme Court has made clear that mandatory statutory deadlines are subject to waiver. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (statutory deadline for filing charge with EEOC "like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); *see also Prou v. United States*, 199 F.3d 37, 46 (1st Cir. 1999) ("That [a federal statute] is phrased in obligatory terms cannot be determinative of a waiver inquiry. If it were, a whole range of constitutional and statutory provisions employing compulsory language would give rise to nonwaivable claims. The case law belies so sweeping a generalization.").

"A party waives a right when it makes an intentional relinquishment or abandonment of it." *United States v. Mitchell*, 85 F.3d 800, 807 (1st Cir. 1996) (internal punctuation and citation omitted).[6]

> To be sure, every waiver need not be express; at times, one can fairly be deduced from conduct or from a collocation of the circumstances. Nevertheless, if proof of a waiver rests on one's acts, his act[s] should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible.

*Irons v. F.B.I.*, 811 F.2d 681, 686 (1st Cir. 1987) (internal quotation marks and citations omitted). Here, the conduct of FrontierVision can reasonably be explained only as the relinquishment of its right to a decision on its proposal within four months after it was delivered on June 1, 1999. FrontierVision engaged in four informal negotiating sessions with the defendant before mentioning the deadline for the first time in a letter dated November 14, 2000, some 18½ months after the proposal was submitted. The first suggestion that formal procedures be suspended came from FrontierVision, and FrontierVision did not object to the defendant's proposal that this suspension occur after FrontierVision submitted its response to the request for proposal. The factual circumstances in this case are not at all ambiguous on this point. *See generally Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434, 438 (6th Cir. 1977) (noting that cable operator and franchising authority agreed to waive certain procedural requirements of Cable Act).

The Supreme Court observed almost seventy years ago that

> [t]he applicable principle is fundamental and unquestioned. He who prevents a thing from being done may not avail himself of the

[6] FrontierVision relies on Maine case law to support its argument that the doctrines of waiver and estoppel are inapplicable here. Reply Memorandum at 5-7. "[A]s a general proposition, the waiver of a federal right is a question of federal law." *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 n.12 (9th Cir. 1997); *see also Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1122-23 (7th Cir. 1998). In any event, my conclusion would be the same were I to apply Maine law. *See Department of Human Servs. v. Brennick*, 597 A.2d 933, 935 (Me. 1991) (waiver "may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon").

> nonperformance which he has himself occasioned, for the law says to him, in effect: "This is your own act, and therefore you are not damnified." Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. A suit may not be built on an omission induced by him who sues.

*R. H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934) (internal quotation marks and citations omitted). While FrontierVision may not have, strictly speaking, prevented the defendant from complying with the four-month deadline, its conduct most certainly induced the defendant to fail to comply with it. That is sufficient to bar the relief sought by FrontierVision under the statute.

Even if that were not the case, I would find that the defendant's failure to comply with the four-month deadline constitutes harmless error. While there is as yet no reported case law construing this relatively new provision of the Cable Act, the only harm suggested by FrontierVision to have resulted from the defendant's lack of compliance is the following:

> Adelphia would, if these violations continue unabated by this Court, be forced to defend someone else's stale proposal instead of having the opportunity to present and defend (if any defense is necessary) a proposal for improved cable television service for the citizens of Naples based on what *it* can do for the community's cable-related needs and interests, in light of the facts that exist *now*, under its management, and not under limitations that affected a former company that had put itself on the market at the time the proposal was submitted.

Reply Memorandum at 2 (emphasis in original). This "harm," if it is such at all, arises as much out of Adelphia's decision to acquire the interests of the partners in FrontierVision after its proposal had been submitted as it does out of the delay itself. FrontierVision has submitted no evidence that Adelphia undertook this acquisition only on the condition that the proposal be withdrawn, that it disavowed the proposal after the transfer of ownership, or that it sought to withdraw the 1999 proposal at any time prior to November 14, 2000, when it had become clear that informal negotiations

between the parties had broken down. Indeed, the only "harm" set forth by the plaintiff in this passage is alleged harm to the users of its service, not to itself. It is the role of the defendant to represent the interests of those individuals. The harm to which the statute refers must be harm to the party seeking to invoke its protection. If FrontierVision means to invoke "harm" in the sense of harm to the statutory procedural scheme itself, no such harm is demonstrated in its submissions to this court.

**B. The Ordinance**

FrontierVision also asks this court to enjoin the defendant "from attempting to circumvent the legal requirements of § 546 by enacting an ordinance to mandate the inclusion of terms in renewal franchises." Verified Complaint at 10. To the extent that this request survives my finding that FrontierVision has waived any entitlement to relief based on the defendant's failure to comply with the four-month deadline set forth in section 546(c)(1), FrontierVision is not entitled to such relief.

First, no proposed ordinance has been submitted to the court, so that it is impossible for the court to conclude that the ordinance would circumvent the legal requirements of section 546 in any way. Second, and more important, as a matter of law, courts may not enjoin the enactment of local ordinances in advance.

> [I]t cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts, which a court of equity will not enjoin.

*New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481 (1896). "The *New Orleans* Court made clear that the role of the court is to intervene, if at all, only after a legislative

enactment has been passed." *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 415 (6th Cir. 1999).

The only case cited by FrontierVision in support of its request, *Birmingham Cable Communications, Inc. v. City of Birmingham*, 1989 WL 253850 (N.D. Ala. May 5, 1989), is distinguishable because the ordinance at issue in that case had been enacted and was properly before the court for its consideration. *Id*. at *1 & fn.4. Unless and until the defendant enacts an ordinance, presumably pursuant to the authority granted by 30-A M.R.S.A. § 3008(2), that harms FrontierVision, this court may not consider an application for injunctive relief to FrontierVision concerning such an ordinance.

**III. Conclusion**

For the foregoing reasons, and because the defendant has indicated its intention to act promptly on the pending franchise renewal proposal submitted in 1999 by FrontierVision, making it unnecessary for the court to order it to do so, it is hereby **ORDERED** that judgment shall be entered for the defendant on all claims.

Dated this 7th day of March 2001.

_____
David M. Cohen
United States Magistrate Judge

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